"The right leg is markedly weak and 1" shortened. There is a good range of movement in the right hip but there is pain at extremes of movement. The right knee is badly disorganised. There is only 40° of flexion instead of 135 — 140°. There is about 5° limitation of extension. There is pain on movement. One of the fractured ends is jutting beneath the skin. There is wasting of the thigh muscles and loss of sensation of the outer aspect of lower leg. Partial recovery from the sciatic nerve. The patient was walking with the aid of a crutch when I saw him. Knee is unstable. He could do sedentary work by the end of 1961. I think an operation to fuse the knee is necessary which means to make it completely rigid.

When I first saw him I was not of the opinion that plaintiff could never be able to walk again. I cannot say that plaintiff is making steady recovery."

So much for the injuries.

The other relevant facts are that the appellant is a young man, aged 23; that he is married and that prior to the accident he made a living as an itinerant hawker of a drink known as "chendul" which he hawked round mines and schools. On all that, considered by itself, I would say that $10,000 is an inadequate amount of compensation and when I turn to the learned Judge's grounds of judgment I come to the conclusion that he has paid insufficient, if any, regard to the question of probable loss of earnings.

As I have said, the appellant was an itinerant drink seller. He said he made a profit of $300 a month out of that occupation. I think it was conceded yesterday by his own counsel that was a probably very much exaggerated figure. Nevertheless that was how he made his living and clearly he cannot make it in the same way now with the injuries which he has suffered. The Judge dealt with the matter by saying that he can still sell his drinks from a stall instead of hawking them around. That may well be. There is, however, no evidence whatsoever to suggest that selling these drinks from a stall will be as profitable as selling them in the itinerant way in which he was selling them before his accident.

As I have said, the appellant is 23 years of age. No doubt he will adapt himself to his injured condition with less difficulty than would an older man. No doubt if he is a person of ordinary human capacity he will work out some way of making an adequate living. But clearly for some time his earning capacity and his earnings are going to be diminished and in my opinion that consideration has either been altogether overlooked by the trial Judge or given inadequate weight.

Bearing everything in mind pain and suffering, loss of amenity and probable loss of earnings arising from certain (though perhaps temporary) diminution of earning power, I would myself assess the damages at $18,000 and I would allow the appeal to that extent with costs.

Barakbah J.A. and Neal J. concurred.

Appeal allowed.

Solicitors:—*Murphy & Dunbar; Skrine & Co.*

LEE AH CHYE v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Barakbah J.A. and Gill J.) August 27, 1963]

[K.L. — F.M. Criminal Appeal No. 22 of 1963]

Criminal Law—Penal Code ss.84, 302—Murder—Plea of insanity—Reading of s.84 to the Jury—Whether a misdirection—Burden of proof.

Though some sections of the Penal Code are extremely abstruse and it would be wrong to expect a jury or any other body of laymen to come to any very definite conclusion regarding the meaning without considerable assistance from the Judge, section 84 is not one of these sections and the reading of it to a jury is an adequate direction subject to this that where there is a considerable body of conflicting evidence it may be necessary to indicate its application to particular parts of the evidence.

Observations on the burden of proof in cases of insanity.

Cases referred to:—

(1) *Rex* v. *Baskerville* [1916] 2 K.B. 658, 667.

(2) *Azro* v. *Public Prosecutor* [1962] M.L.J. 321, 322.

(3) *Chia Chan Bah* v. *The King* [1938] M.L.J. 147.

(4) *Rex* v. *Sodeman* [1936] 2 All E.R. 1138.

COURT OF APPEAL (CRIMINAL).

R. Ponnudurai for the appellant.

Gunn Chit Tuan (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): This appellant was convicted at Penang for murder in contravention of section 302 of the Penal Code and was sentenced to death. Against that conviction he has now appealed.

At the trial there was really very little controversy as to the facts.

A married woman named Wong Ah Tai, who was some sort of a domestic servant and who ran a tontine in her spare time, was stabbed to death. Twenty-two stab wounds were inflicted on her body. At the same time her daughter, a girl of about twelve years of age, was also stabbed but not fatally.

It has never been in dispute that the stab

wounds from which the deceased woman died were inflicted by the appellant.

The prosecution case was that the parties were known to each other; that on the evening of 2nd April, clearly by some sort of previous arrangement, they met; that the appellant and the deceased woman and her daughter then went off in a hired car, which had been hired and was driven by the appellant; that some time in the course of the evening they got to Mount Erskine and that there the appellant inflicted the fatal wounds on the deceased and the non-fatal wounds on her daughter. According to the evidence of the daughter the wounds were inflicted by the appellant on her mother while her mother was seated in the car.

The appellant's story, which as regards its main element was clearly incredible, was that the mother of the girl left the car to relieve the necessities of nature; that he heard some noise which attracted his attention; that he went towards it and saw an enormous snake attacking the woman and her daughter and that like some modern Asian St. George he rushed to the spot with a knife which was not his own but which, most conveniently, he happened to find in the hired car and attacked the creature only to find that what he had stabbed was not a snake but the woman and her daughter.

That was the case for the prosecution and the case for the defence.

It should be added that there was no evidence of any motive for the killing. I think in fairness to the dead woman it should be said there was no suggestion whatsoever of any sexual motive and in fairness to the appellant it should be said there was no suggestion of robbery. There was, however, no evidence as to what the motive, if any, was.

At the trial the only real issue was whether or not at the time of the killing the appellant was insane so as to bring the case within section 84 of the Penal Code. We will deal with that defence shortly in connection with the principal grounds of appeal.

Before doing so I would observe that the conviction has been attacked with some pertinacity on grounds with which we are very familiar here.

It has been said that the trial Judge's direction as to the law of murder was inadequate. I do not think any Judge has ever succeeded in giving a direction on the law of murder as set out in sections 299 and 300 of the Penal Code that has not been open to some sort of attack. In the present case, however, there was no need for any very extensive exegesis of the law of murder. Apart from the question of insanity, the facts spoke for themselves and it was clear that whoever inflicted the wounds on the dead woman committed murder.

Then it was said that in discussing a number of points that arose on the evidence the Judge expressed his own view in a sense unfavourable to the appellant rather more freely than he should have done. To our minds this amounts to nothing more than the frequent complaint that the summing-up was not as favourable to the prisoner as it might have been. In any event the facts surrounding the killing were not of paramount importance. It was not of paramount importance whether it took place on the grass beside the road or it took place in the motor-car. The only thing that was of importance was whether or not at the material time the appellant was insane.

Again, it was said that the Judge's direction as to the evidence of the daughter was inadequate. It was said that although he very properly directed the jury that they should look for corroboration because she was a young girl who did not give her evidence on affirmation he did not go on to explain what corroboration was. That is very true. It is well-settled law that corroboration in the case of a young child must be of the same nature as corroboration in the case of accomplice evidence, that is there must be independent corroborative evidence on a material particular implicating the accused. That is what was said in *Baskerville's* case.[1] Here the Judge did not give that direction as to the nature of the corroboration required and to that extent he was, of course, wrong. In all the circumstances of the case, however, we fail to see how giving such a direction could have affected the jury in any way and in our view the case clearly comes within the scope of the proviso to section 29(1) of the Courts Ordinance.

That brings us to the main ground of appeal, and that is that the defence of insanity was not adequately put to the jury. That complaint was divided into two parts.

In the first place it was said that the law was not adequately explained because the Judge confined himself to reading to the jury the terms of section 84 of the Penal Code. Some sections of the Penal Code are extremely abstruse and it would be wrong to expect a jury or any other body of laymen to come to any very definite conclusion regarding the meaning without considerable assistance from the Judge. In our view, however, section 84 is not one of these sections and the reading of it is a course which is followed again and again by Judges in dealing with this particular subject.

What section 84 says is:—

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

In other words, there must be a certain state of mind — incapacity of knowing the nature of the act or incapacity of knowing it is wrong — but in every case that must exist by reason of unsoundness of the mind. Now, this is nothing but a translation into simple language of a statement of the law given by the Judges in England commonly known as the M'Naghten rules and generally speaking we are of the opinion that to read it to a jury is an adequate direction, subject to this that where there is a considerable body of conflicting evidence it may be necessary to indicate its application to particular parts of the evidence. Here, however, the evidence was short and straightforward. The medical evidence called by the defence did not support insanity in any way. There was nothing in the conduct of the appellant after his arrest as it transpired from the evidence that suggested any unsoundness of mind. And as regards the story of the snake the jury had seen the appellant in the witness-box, they had heard his story and they were in a position themselves to say whether they thought it made out unsoundness of the mind. In the circumstances we think the Judge's direction on the point was adequate.

The other point on which the Judge's direction as to insanity was attacked was that he misdirected the jury as to the weight of burden of proof. On that point we can only say that we adhere to what we said in the case of *Azro* v. *Public Prosecutor* [2] where we accepted as binding on us what was said by Sir Percy McElwaine as long ago as 1938 in the Straits Settlements case of *Chia Chan Bah* v. *The King*.[3]:—

"In a trial for murder it is incumbent on the Crown to prove beyond reasonable doubt that the accused killed the deceased by an act which constitutes murder within the meaning of section 300 of the Penal Code. Where the defence is insanity the onus is on the accused to prove that he was probably insane. This onus is placed upon him by section 106* of the Evidence Ordinance, but the law does not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt. It is sufficient if he tip the scale of probability in his favour — if he induces in the mind of the jury a feeling that he probably was insane though the jury may have its doubts whether he really was insane. As it is put in *Rex* v. *Sodeman* [4] the onus on an accused in setting up such an exception as insanity is no higher than the onus on an accused in setting up such an exception as insanity is no higher than the onus on a plaintiff or defendant in a Civil Suit."

* S. 105 of the F.M. Evidence Ordinance (No. 11 of 1950).

The direction as to the burden of proof in this case is substantially the same as that and we do not think it is open to us after 25 years to say that that is wrong.

The appeal is dismissed.

Appeal dismissed.

Solicitors:—*Rajendra & Teik Ee.*

AU-YONG v. DICUM & ANOR.

[C.A. (Thomson C.J., Barakbah J.A. and Neal J.) September 11, 1963]

[K.L. — F.M. Civil Appeal No. 28 of 1963]

Bankruptcy—Bankruptcy notice—Substituted service —Copies of notice unsealed and unsigned—Whether valid —Whether mere irregularity or nullity—Bankruptcy Rules, 1921, rr. 95 & 107.

Practice and Procedure—Counterclaim not set up in the action—Whether it can be set up at hearing of petition.

After three unsuccessful attempts by a process server of the court to serve on the debtor a bankruptcy petition by the petitioning creditor, the latter obtained an order for substituted service which read, "the bankruptcy notice on the debtor be served by posting copies of the notice, together with copies of the order for substituted service on the notice boards of the Supreme Court and the Magistrate's Court and on the front door of No. 9A Keng Hooi Road, Kuala Lumpur, being the last known place of residence." Service in this form was duly effected.

The debtor opposed the bankruptcy petition on the grounds that (a) he had a counterclaim against the petitioning creditor in the sum of $27,000 being fees for professional services and (b) the bankruptcy notice was not duly served on him because it did not bear the seal of the Court and the signature of the Registrar under whose hand it was issued contrary to Rules 95 and 107 of the Bankruptcy Rules, 1921.

In the Court below (*ante* p.246), the learned judge made a receiving and adjudicating order against the debtor. On appeal:

Held: (1) the debtor not having raised his counterclaim in the original proceedings against him as he could have done, he could not now raise it in order to set aside the bankruptcy notice;

(2) (by Thomson C.J. and Barakbah J.A.) even if service of an unsealed and unsigned copy of the bankruptcy notice was contrary to the Bankruptcy Rules, it was a mere irregularity which had occasioned no injustice to the debtor;

(3) (by Neal J.) no breach of a mandatory rule is an irregularity but in the circumstances of the case no court could direct these proceedings be rendered void.

Cases referred to:—

(1) *Ex parte Chatteris* L.R. 10 Ch. 227.

(2) *Muthiah Chettiar ex parte Ramanathan Chettiar* [1938] M.L.J. 233.

(3) *In Re G.E.B., A Debtor* [1903] 2 K.B. 340, 349.

(4) *Watt* v. *Barnett* (1878) 3 Q.B.D. 363, 366.